NO. 82-6852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIE JAMES WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Supreme Court of Georgia properly determined that the imposition of the death penalty in Petitioner's case was proper because the jury had found at least one constitutional statutory aggravating circumstance?

II.

Whether Georgia must more extensively explain the purpose and role of mitigating circumstances to the jury during the sentencing phase of the trial?

III.

Whether the individual actions and tactics of Petitioner's counsel at trial, an issue not raised on appeal below, should be reviewed by this court?

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PART ONE

STATEMENT OF FACTS

Willie James Wilson, Petitioner, was indicted in Pierce County, Georgia during May, 1981 for the murders of Morris Highsmith and Alfred Boatwright, and the armed robbery of Alfred Boatwright. Following a trial by jury, Petitioner was found guilty on all counts. During the sentencing phase of Petitioner's trial, the jury recommended the sentence of death for each of the murders. The conviction itself was upheld on direct appeal to the Georgia Supreme Court.

Georgia law requires that a decision to impose the death penalty be authorized by the finding of at least one statutory aggravating circumstance. O.C.G.A. § 17-10-30; Ga. Code Ann. § 27-2534.1. In Petitioner's case, the statutory aggravating circumstances found by the jury were that the murder of Alfred Boatwright was committed while

the Appellant was engaged in the commission of two other capital felonies, i.e., the murder of Morris Highsmith and the armed robbery of Alfred Boatwright, and the murder of Highsmith was committed while the Appellant was engaged in a commission of two capital felonies, i.e., the murder of Morris Highsmith and the armed robbery of Alfred Boatwright.

In its review of the conviction the Georgia Supreme Court applied the doctrine of "mutually supporting aggravating circumstances", and set aside the statutory aggravating circumstance that the murder of Highsmith occurred during the murder of Boatwright. Wilson at 638. However, the Supreme Court of Georgia found that the remaining statutory aggravating circumstances were enough to support Petitioner's sentence of death and did not require the reversal of either sentence. Id. This petition for writ of certiorari seeks a review of that judgment of the Supreme Court of Georgia.

As a review of the facts presented at Petitioner's trial is necessary for this Court's determination of whether or not a petition for a writ of certiorari should be granted, a summary of the evidence admitted at Petitioner's trial is presented at this time for this purpose.

Petitioner, classified as a Private in the United States Army, left Ft. Stewart without permission during the middle of June, 1981, and did not return to base. (T. 2362, 2370, 2373). On the afternoon of Saturday, June 20, 1981, Petitioner was seen practicing his target shooting with a .38 caliber pistol he had taken, without permission, from his father. (T. 1439-40, 1459, 1462-4, 1466, 1469, 1568-69, 2358, 2380-82). Two days later, on Monday, June 22, 1981, Petitioner and Darris Miller drove to Hoboken, Georgia, where Petitioner filled out job application forms. (T. 1474-8, 1482-6, 1606, 1636-8).

Miller testified at trial that Appellant stated he "needed some money" and spoke about "hitting" a place. (T. 1608-9). Appellant removed his pistol from under the car seat, Miller inserted two shells into it, and Appellant replaced the weapon under the seat. (T. 1610-11, 1649). The men drove around looking around for a suitable place to rob. (T. 1609). Petitioner told Miller, "if he was to ever hit a place, he don't leave no witnesses." (T. 1611). Miller and Petitioner later separated. (T. 1611-12, 1616, 1659, 2404).

Boatwright's Handy Stop, located in Bristol, Georgia, had been owned by Alfred Boatwright, but in 1979 he had retired from the business and leased it to his daughter. He relieved his daughter, who was working at the store, at approximately 3:45 p.m. on the afternoon of June 22nd. (T. 1686, 1699). He was accompanied by his friend Morris Highsmith.

Petitioner contends that he went to the store to fill his car with gas, although he admits he didn't have enough money to pay for his purchase. (T. 2416). Petitioner then alleges that, after telling Mr. Boatwright he could not pay for the purchase, Petitioner and Boatwright began to argue. (T. 2160-61, 2364-66, 2423-24). Petitioner maintains that he then took his pistol from his pocket in an attempt to exchange it for gasoline. Mr. Highsmith began to duck behind the counter, and Appellant then began firing his loaded pistol because he feared that he would be hurt. (T. 2365, 2426, 2449). There is no question, and Petitioner has admitted, that he shot both Mr. Highsmith and Mr. Boatwright, and then took money from the store. (T. 2162, 2165-69, 2426, 2432, 2449).

The evidence presented by the state's case shows a different scenario. According to expert medical testimony, Morris Highsmith was instantly paralyzed by the shot fired from Petitioner's gun, and his body was found,

not behind the counter, but some distance from it, collapsed on the floor, with his chair tipped over on his legs. (T. 1744, 1746, 1751, 1895, 1918). Mr. Boatwright died within the hour, after managing to crawl from the middle of the floor to the telephone and call for help. (T. 1723-7, 1772-3, 1776).

Petitioner was arrested on June 30, 1981 in Hinesville, Georgia. (T. 1870-3). He was interviewed by the authorities at the Hinesville Police Department after being given his Miranda warnings and signing a waiver of rights form. (T. 2210-2, 2228, 2267-70). At a Jackson v. Denno hearing held at trial, the statement made by Appellant to the police was ruled voluntarily given. (T. 2110-2207). Appellant repeated his story when he testified at trial. (T. 2370-73). Further facts will be discussed as is necessary for consideration by this Court in determining whether the petition for a writ of certiorari should be granted.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY APPLIED GEORGIA STATE LAW, IN ACCORD WITH ZANT V. STEPHENS, 51 U.S.L.W. 4891 (U.S. Jun. 22, 1983), IN DETERMINING THAT THE IMPOSITION OF THE DEATH PENALTY IN PETITIONER'S CASE WAS VALID AND PROPER BECAUSE IT WAS AUTHORIZED BY AT LEAST ONE CONSTITUTIONAL STATUTORY AGGRAVATING CIRCUMSTANCE

Petitioner contends that the Supreme Court of Georgia, in reviewing Petitioner's sentence of death, erred in allowing that sentence to stand after invalidating one of the statutory aggravating circumstances relied on by the jury. Respondent submits that the Supreme Court of Georgia was correct in its decision and fully in accord with this Court's position as stated in Zant, Warden v. Stephens, 51 U.S.L.W. 4891 (U.S. Jun. 22, 1983).

This Court originally upheld the Georgia death penalty statute in Gregg v. Georgia, 428 U.S. 153 (1976). More recently, the statute has again come under the close scrutiny of this Court in Stephens, supra. The challenges to the Georgia statute in Stephens were almost identical to the challenges presented here by the Petitioner.

In Stephens, the petitioner alleged that a statutory aggravating circumstance allowed the jury too much discretion, which was forbidden by Furman v. Georgia, 408 U.S. 238 (1972). Additionally, the petitioner claims the Georgia statute violated Stromberg v. California, 283 U.S. 359 (1931) and suggested that the mere mention of an invalid statutory aggravating circumstance might require

that a death sentence be set aside. This Court then undertook a lengthy examination of the Georgia statute, including the certification of the following question to the Georgia Supreme Court.

> What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?

Stephens at 4893 n. 11. In response to this certified question, the Georgia Supreme Court set out clearly and concisely its interpretation of the Georgia death penalty statute. Zant v. Stephens, 250 Ga. 97 (1982). The Supreme Court of Georgia analogized the Georgia death penalty statute to a pyramid-type structure, where statutory aggravating circumstances could be used by the jury to raise from one level to a higher level those murders for which the death penalty may be considered. Id at 99-100. Once any statutory aggravating circumstance is found, it then becomes a question of the jury's discretion as in whether or not to impose the death penalty. Id. In reviewing the answer to this certified question, this Court specifically approved the Georgia statute as written and found it completely constitutional. Stephens, 51 U.S.L.W. at 4898 (U.S. Jun. 22, 1983).

The heart of Petitioner's Enumeration of Error No. 1 is that the Georgia death penalty statute violates both Furman and Stromberg. However, in this Court's most recent evaluation of the Georgia statute the Majority of the Court found no constitutional infirmity in the statute. Petitioner's argument on this point offers no new question of fact or law which this Court has not already dealt with in the recent case of Stephens. For

this reason, Respondent respectfully submits that the Supreme Court of Georgia has properly dealt with this issue and that there is nothing presented for the review of this Court.

II. THE PRESENTATION OF MITIGATING EVIDENCE AND INSTRUCTIONS THEREON TO THE JURY DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL WAS SUFFICIENT TO GUIDE THE JURY IN ITS DECISION ON WHETHER OR NOT TO IMPOSE THE DEATH PENALTY.

The Petitioner also contends that the trial court's instructions to the jury were inadequate because they did not more fully explain the purpose and role of mitigating circumstances in the jury's sentencing decision. Respondent submits that the trial court's instructions on mitigating circumstances fully and completely complied not only with the requirements of Georgia law, but also with the guidelines established by the Eleventh Circuit Court of Appeals.

The law of Georgia requires that in all cases tried by a jury in which the death penalty may be imposed, a pre-sentence hearing must be held in which the jury may hear, and later consider, any mitigating or aggravating circumstances regarding the defendant and the crime involved. O.C.G.A. § 17-10-2; Ga. Code Ann. § 17-1503. However, the exact definition of what should be considered mitigating has been left open by the state legislature, meaning that the jury is empowered to consider as mitigating any of the evidence presented. Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979). It is also clear that the jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court. Gregg v. Georgia, 428

U.S. 153 (1976). It is equally clear that where the trial court fails to charge a jury, in the absence of a request, on the law and existence of mitigating circumstances during the sentencing phase of the trial, the death penalty must be set aside. Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977). This entire procedure involving the Georgia death penalty statute was originally approved of in Gregg, and that approval has been most recently reiterated in Zant v. Stephens, 51 U.S.L.W. 4891 (U.S. Jun. 22, 1983). Indeed, in Stephens, this Court specifically and fully discussed the procedure of presenting aggravating and mitigating circumstances to the jury and explicitly found the statute constitutional. Id at 4894-95.

It is unquestioned that a defendant in a capital murder trial must be allowed to proffer, and a jury be permitted to consider, any evidence of mitigation submitted as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978). In most cases, this will mean that the judge must clearly and explicitly instruct the jury about the existence and function of mitigating circumstances and their option to recommend against death. Spivey v. Zant, 661 F.2d 464, 471 (5th Cir. 1981).

The sentencing phase and jury instructions of Petitioner's trial fully complied with these legal requirements. At the sentencing phase, Petitioner presented extensive testimony by Petitioner's father and mother, his aunt, and his ex-wife. (T. 2664-2689). Petitioner himself took the stand and had ample opportunity to present any testimony he desired on his behalf. (T. 2689-2702). The trial court then began a lengthy charge regarding the possible sentences that could be imposed on the defendant. (T. 2689-2702). The trial court told the jury:

> [I]t is for you, the jury, to determine in this case, whether the defendant shall be punished by death or by imprisonment for life for the murder of Alfred Boatwright, and whether the defendant shall be punished by death or by imprisonment for life for the murder of Morris Highsmith.
>
> In reaching that determination, you shall consider all of the evidence, facts and circumstances of the case which have appeared at both the guilt-innocence phase and at this pre-sentencing phase of the trial of this case, including any and all evidence in extenuation, mitigation and aggravation of punishment.

(T. 2788-89).

The trial court then went on to discuss the statutory aggravating circumstances, and then cautioned the jury:

> In considering the penalty to be imposed upon the defendant for the murder of Alfred Boatwright, members of the jury, even if you should find one or more of the statutory aggravating circxumstances which I have just given you in the charge to exist beyond a reasonable doubt, you are not required to impose upon the defendant the death penalty for the murder of Alfred Boatwright, but you would still be authorized to, and may impose upon the defendant imprisonment for life rather than death.

(T. 2790-91).

This same explicit instruction about the jury's option to recommend against death was then repeated regarding the murder of Morris Highsmith. (T. 2691-92). After this, the trial court again cautioned the jury to consider any and all evidence, facts and circumstances in extenuation, mitigation and aggravation of punishment in their determination of the appropriate punishment for the Petitioner for the murders he had committed. (T. 2792, 2793, 2794). Neither the State nor the Petitioner had any objections to the charge at that time. (T. 2800). The jury returned a recommendation of the death penalty. (T. 2802-03).

It is clear from the record that Petitioner had extensive mitigating evidence presented to the jury during the sentencing phase of his trial. It is also clear from the record that the trial court adequately instructed the jury on their ability to recommend against the death penalty and to consider all mitigating and extenuating circumstances in the making of their decision. The trial court fully complied with all the requirements of both state and federal law in its actions. The overall structure and operation of the Georgia death penalty statute has been specifically and recently approved of by this Court, and there is no violation of that law present here. Therefore, Respondent respectfully submits that this issue presents nothing for review by this Court.

III. THE PARTICULAR ACTIONS AND TACTICS OF PETITIONER'S TRIAL COUNSEL, NOT QUESTIONED ON APPEAL BELOW, DO NOT CONSTITUTE PLAIN ERROR AND DID NOT AFFECT THE FUNDAMENTAL FAIRNESS OF THE PETITIONER'S TRIAL

Petitioner has raised an allegation, for the first time, that his trial counsel was guilty of gross misconduct in statements made during the closing arguments at the trial. Respondent submits that the issue of ineffective assistance of counsel should not be raised for the first time on appeal to this Court, but it if is considered, the trial counsel's action, which may be the result of counsel's tactical decisions, were correct, proper, and fundamentally fair to the Petitioner.

It is a well-established principle of law that this Court will not decide federal constitutional issues raised for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). Such questions which were not raised below are very likely to have an inadequate record, since it was certainly not compiled with those questions in mind, and in the federal system, it is very important that the state courts be given the first opportunity to consider the application of state statutes in light of any constitutional challenge. Id at 439.

Petitioner admits that this issue was not raised on appeal below but contends that it is such plain error that it should be raised and reviewed by this Court. However, it is not such plain error as the Petitioner contends. The Petitioner, who is seeking to overturn his conviction on grounds of ineffective assistance of counsel, must prove his entitlement to relief by a preponderance of the evidence. Washington v. Strickland, 693 F.2d 1243, 1250

(5th Cir. 1982); see also, Michel v. Louisiana, 350 U.S. 91 (1955). That burden has not been carried by the Petitioner either in the state courts below or in this Court.

There is no doubt, and Appellant admitted in open court, that he shot both Mr. Boatwright and Mr. Highsmith. (T. 2365, 2433-5). Petitioner's counsel had to deal with this confession in the method he thought was the best in his professional judgment. Our adversary system of justice requires that attorneys be permitted to exercise informed discretion in the conduct of the client's defense. Washington, at 1254, citing, United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1976). If an attorney makes a stragetic choice to rely upon one line of defense rather than another, and that choice is based upon the exercise of professional judgment after a reasonable substantial investigation into all plausable lines of defense, the courts will find ineffective assistance of counsel only if the choice was so patently unreasonable that no competent attorney would have made it. Washington at 1254.

There is no information at all in the record as to whether Petitioner's counsel was pursuing some particular line of defense which he thought best in his professsional judgment. It could only be mere speculation to attempt to build a case of misconduct or incompetence based on such an incomplete record. Petitioner's counsel has not been given any chance to respond to such criticism and the state courts have been denied any chance of reviewing these state issues. For this reason Respondent respectfully submits that this issue presents nothing for review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorai to the Supreme Court of Georgia, as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This 29th day of June, 1983.

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